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No. 84-1518

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

TRI-STATE MOTOR TRANSIT CO., and
AMERICAN TRUCKING ASSOCIATIONS, INC.,

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS
OF AMERICA,

Petitioners,

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,

and

THE DENVER AND RIO GRANDE WESTERN
RAILROAD COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF IN OPPOSITION OF RESPONDENT, THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

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QUESTIONS PRESENTED

1. Whether parties who were unsuccessful in challenging an Interstate Commerce Commission policy change that removed artificial constraints against railroads' acquiring unrestricted motor common carrier authority are foreclosed from reviving their substantive arguments in a licensing proceeding in which the policy was applied.

2. Whether the court of appeals' decision was properly based on the conclusion that an agency-created doctrine that formerly required railroads to demonstrate "special circumstances" in advance of receiving unrestricted motor carrier authority did not accord with current economic conditions or Congressional policies favoring competition.

PARTIES TO THE PROCEEDING BELOW

Tri-State Motor Transit Company

American Trucking Associations, Inc.

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

Interstate Commerce Commission

United States of America

The Denver and Rio Grande Western Railroad Company

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IN THE

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No. 84-1518

TRI-STATE MOTOR TRANSIT CO., and
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INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF IN OPPOSITION OF RESPONDENT, THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

Respondent, The Denver and Rio Grande Western Railroad Company ("Rio Grande" or "DRGW"), opposes the petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit filed in No. 84-1518 by the American Trucking Associations, Inc., Tri-State Motor Transit Co., and the International

Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America (respectively, "ATA," "Tri-State," and "Teamsters"; collectively, "Trucking/labor petitioners"). Rio Grande takes no position with respect to the petition for a writ of certiorari filed in No. 84-1515 by the Solicitor General on behalf of the Interstate Commerce Commission ("ICC" or "Commission") and the United States (collectively, "Government petitioners").

OPINIONS BELOW

The opinion of the court of appeals (U.S. App. at 1a-8a)[1] is reported at 739 F.2d 1373. The decisions of the ICC (U.S. App. at 11a-15a, 16a-21a) are unreported.

JURISDICTION

The judgment of the court of appeals (U.S. App. at 9a) was entered on August 3, 1984. A timely petition for rehearing and suggestion for rehearing en banc was filed by the Government and was denied on October 26, 1984. *See* U.S. App. at 10a. On January 15, 1985, an order was entered by Justice Blackmun extending the time for filing a petition for a writ of certiorari to and including March 25, 1985. The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. §§ 1254(1) and 2350(a) (1982). The jurisdiction of the court of appeals was invoked pursuant to 28 U.S.C. §§ 2321 and 2342(a) (1982).

STATUTES INVOLVED

The relevant provisions of the Administrative Orders Review Act of 1950 ("Hobbs Act"), 28 U.S.C. §§ 2341-2351 (1982), on which Government petitioners rely are set forth at U.S. App. at 22a-28a. The appendix to the Trucking/labor petition sets forth provisions of the In-

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[1] For the sake of brevity and to avoid burdening the Court with duplicative filings, Rio Grande has relied on the appendices to the Government's petition, hereinafter cited as "U.S. App."

terstate Commerce Act, 49 U.S.C. §§ 10101-11917 (1982), at 18a-27a.

STATEMENT OF THE CASE

1. To comport with the regulatory changes effected by the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980), and the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980), the ICC announced on October 9, 1981 that it would conduct a rulemaking proceeding in order to reconsider its policy restricting grants of motor carrier licenses to railroads. *See* 46 *Fed. Reg.* 50,423 (October 13, 1981). On January 6, 1983, after notice and comment by a number of interests, including ATA, the Commission issued its final decision in *Ex Parte No. MC-156, Motor Carrier Operating Authority—Railroads*, 132 M.C.C. 978 (1982) (*"Ex Parte MC-156"*), *aff'd sub nom. American Trucking Ass'ns, Inc. v. ICC*, 722 F.2d 1243 (5th Cir.), *cert. denied*, 105 S. Ct. 324 (1984). In its decision, the Commission abolished, in licensing proceedings, the "special circumstances" doctrine that it had created after passage of the Motor Carrier Act of 1935, Pub. L. No. 255, Ch. 498, 49 Stat. 453 (1935), to protect the nascent motor carrier industry from possible encroachment by rail carriers.[2]

2. On April 6, 1983, Rio Grande, a railroad providing service within the States of Colorado, Utah, Kansas, and Missouri, applied for unrestricted motor common carrier authority in accordance with the *Ex Parte MC-156* policy change. To support its application, Rio Grande sub-

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[2] The "special circumstances" doctrine allowed grants to railroads of unrestricted motor common carrier operating authority only if it could be shown that (1) the grant would not restrain competition, and (2) the public interest required the proposed service, which existing carriers had not offered except where it suited their convenience. *See American Trucking Ass'ns, Inc. v. U.S.*, 364 U.S. 1 (1960). The Commission identified the "aim" of the doctrine as "prevent[ion of] rail domination of motor carrier markets." *Ex Parte MC-156*, 132 M.C.C. at 978.

mitted statements from 27 large shippers, all of whom had used Rio Grande's rail service or its restricted motor carrier service.

Only Tri-State Motor Transit Co. ("Tri-State"), a large general commodities carrier, protested Rio Grande's application. Tri-State filed a perfunctory protest alleging that a grant of motor common carrier authority to Rio Grande would harm Tri-State's operations. Tri-State also maintained that Rio Grande was compelled to demonstrate "special circumstances" in advance of receiving a license, disregarding the Commission's decision to discontinue reliance on that policy. In reply, Rio Grande pointed out, *inter alia*, that Tri-State was relying on outmoded standards no longer applicable to grants of authority.

In a decision served September 8, 1983, an ICC Employee Review Board granted Rio Grande's application for nationwide motor common carrier authority to transport general commodities.[3] In denying Tri-State's protest, the Review Board held that "a railroad need no longer demonstrate 'special circumstances' in order to obtain unrestricted motor carrier authority." U.S. App. at 14a (citation omitted).

Tri-State appealed the Review Board's decision. ATA and the Teamsters filed petitions for leave to intervene and for administrative review, arguing that the grant should be overturned because the Review Board had declined to require Rio Grande to demonstrate "special

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[3] Specifically, the Commission approved Rio Grande's request to transport general commodities (except Classes A and B explosives, household goods, and commodities in bulk), between points in the United States (except Alaska and Hawaii). Docket No. MC-166474 (Sub-No. 1), *The Denver and R. G. W. R.R., Extension—Points in the United States (Denver, CO)*. The certificate of public convenience and necessity embodying this authority issued December 16, 1983 and Rio Grande has been operating pursuant to its terms since that time.

circumstances" justifying issuance of an unrestricted certificate.

In a decision served November 15, 1983, the Commission denied the petitions for leave to intervene and for administrative review. U.S. App. at 18a. The Commission held that, in view of the clear policy change enunciated in *Ex Parte MC-156*, the validity of the elimination of the "special circumstances" doctrine constituted "an inappropriate issue to consider" in Rio Grande's individual application proceeding. *Id.* The Commission also held that Tri-State had not made the requisite showing that a grant of Rio Grande's application would be inconsistent with the public convenience and necessity. U.S. App. at 17a.

3. While Rio Grande's licensing application was awaiting final ICC approval, ATA and individual trucking concerns sought review of the Commission's decision in *Ex Parte MC-156* in the United States Court of Appeals for the Fifth Circuit. *See American Trucking Ass'ns, Inc. v. ICC*, 722 F.2d 1243 (1984). The Fifth Circuit phrased the issue on review as "whether the [Interstate Commerce Act] requires application of the special circumstances doctrine in all licensing proceedings" (*id.* at 1244) and held that "the Commission was within its authority in abolishing the special circumstances doctrine in licensing proceedings, ..." *Id.* at 1250.

4. Having failed to persuade the Fifth Circuit that the "special circumstances" doctrine should be revived, Tri-State and ATA sought judicial review of the Commission's decision granting Rio Grande an unrestricted license in the United States Court of Appeals for the Eighth Circuit. The Teamsters intervened to support the trucking interests.

Petitioners did not challenge the application of *Ex Parte MC-156* to Rio Grande's application. Instead, they

devoted their substantive arguments exclusively to the question "[w]hether the special circumstances doctrine, which was created by the ICC, has been recognized by the Supreme Court to be statutorily required." *Tri-State Motor Transit Co. v. ICC*, 739 F.2d 1373, 1375 (8th Cir. 1984), U.S. App. at 5a. As Trucking/labor petitioners now concede, "[t]he Eighth Circuit (like the Fifth Circuit on review of the Policy Statement) answered that question in the negative, . . ." (Pet. at 10) and affirmed in all respects.[4]

5. The Government unsuccessfully petitioned the Eighth Circuit for rehearing and suggested rehearing en banc for reconsideration, *inter alia*, of the holding that the Hobbs Act "precludes an attack on the *procedure* by which the policy was adopted[,]" but "does not bar judicial review of the *substantive validity of the rule, even if more than sixty days have elapsed since its issuance.*" *Tri-State Motor Transit Co. v. ICC*, 739 F.2d at 1375,

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[4] Trucking/labor petitioners agree that the removal of the "special circumstances" doctrine, which "was created by the ICC," was "correct" with respect to licensing, the only matter at issue here. Pet. at 10, n.2. This distinction is important to an understanding of the theoretical nature of petitioners' arguments to this Court. After issuance of its *Ex Parte MC-156* policy statement, the ICC conducted a rulemaking proceeding, *Ex Parte No. 438, Acquisition of Motor Carriers by Railroads*, entire Commission decision served July 27, 1984, in which it removed the requirement that railroads demonstrate "special circumstances" in order to acquire existing motor carriers. ATA and the Teamsters have sought review of this decision in the United States Court of Appeals for the Ninth Circuit. *American Trucking Ass'ns, Inc. v. ICC*, No. 84-7545 (9th Cir. August 15, 1984). Petitioners' inexplicable concession to this Court that the "special circumstances" doctrine is "statutorily-required" only with respect to acquisitions, a matter that is under review by another court of appeals (*see* Trucking/labor Pet. at 10-11, n.2), and "agency-created" with respect to licensing proceedings, the only matter resolved in *Ex Parte MC-156*, is fatally inconsistent with their arguments that the decision to grant Rio Grande an unrestricted license pursuant to that policy change conflicted with Congressional policy and Court precedent.

n.2, U.S. App. at 4a, n.2 (emphasis added). The Government then filed its petition for a writ of certiorari with this Court, seeking review of that issue. The Trucking/labor interests also filed a petition for a writ of certiorari, maintaining that the defunct "special circumstances" doctrine was "a Congressional mandate" that the ICC was not free to change or disregard. Trucking/labor Pet. at i.

6. Shortly after the Eighth Circuit rendered its decision, ATA and the Teamsters filed a petition for a writ of certiorari with this Court to obtain review of the Fifth Circuit's decision upholding the Commission's abolition of the "special circumstances" doctrine in *Ex Parte MC-156*. That petition was denied. *See* 105 S. Ct. 324 (1984).

PRELIMINARY STATEMENT WITH RESPECT TO THE PETITION IN NO. 84-1515

Rio Grande takes no position with respect to the Government's petition, which is concerned primarily with the possible effects of the decision below on the Hobbs Act's centralized judicial review procedures. The Government contends that, in view of the jurisdictional deadlines applicable to petitions for review of ICC decisions, the court of appeals should have dismissed the Trucking/labor interests' arguments for want of jurisdiction instead of reviewing the *Ex Parte MC-156* policy change and affirming the ICC's decision on the basis that removal of the "special circumstances" doctrine was correct. Because Rio Grande's license will remain intact if the Government's petition is granted and the decision below is changed in the manner suggested, it neither supports nor opposes the Government's arguments.

SUMMARY OF ARGUMENT

The decision below, which affirmed an ICC decision to grant a railroad unrestricted motor common carrier authority, followed another court's affirmance of re-

moval of an outmoded agency policy that erected artificial barriers to railroad entry to the motor carrier field. A petition for a writ of certiorari seeking review of the decision affirming the policy change, which was filed by Trucking/labor petitioners in No. 84-2518, was denied last term in No. 83-2117. *See American Trucking Ass'ns, Inc. v. ICC*, 722 F.2d 1243 (5th Cir.), *cert. denied*, 105 S. Ct. 324 (1984).

There is no statutory or other requirement that a railroad must show "special circumstances" in order to obtain motor common carrier authority. The decision below therefore does not conflict with prior decisions of this Court or Congressional policy. Indeed, the decision actually furthers current Congressional policies favoring competition by allowing entry of an efficient new competitor.

REASONS FOR DENYING THE PETITION IN NO. 84-1518

Rio Grande opposes the Trucking/labor petition, which should be denied summarily by this Court.

I. Petitioners Have Failed to Present Any Significant Legal Issue Warranting Review by This Court.

A. The identical arguments that Trucking/labor petitioners raise to this Court were presented in the petition for a writ of certiorari filed last term in No. 83-2117, which sought review of the judgment in *American Trucking Ass'ns, Inc. v. ICC*, 722 F.2d 1243 (5th Cir.), *cert. denied*, 105 S. Ct. 324 (1984). In that case, the Fifth Circuit affirmed the underlying rulemaking proceeding that furnished the impetus for Rio Grande's application. Nothing has changed since these interests first petitioned for review on these issues, and their arguments do not become more persuasive upon repetition.

B. There is no conflict in the courts of appeals on the propriety of the Commission's removal of the "special

circumstances" doctrine, nor is there any departure from this Court's prior decisions. The Fifth and Eighth Circuits disagreed with the contention that the doctrine was a "Congressional mandate" to which the ICC was compelled to adhere. *See, e.g., American Trucking Ass'ns, Inc. v. ICC*, 722 F.2d at 1250; *Tri-State Motor Transit Co. v. ICC*, 739 F.2d at 1376. Prior precedent of this Court required that the Commission interpret the Interstate Commerce Act "as a whole"; when the Act, as amended by the Motor Carrier Act of 1980 and Staggers Rail Act of 1980, was considered "as a whole," the ICC "had proper authority to find that the special circumstances doctrine should no longer be recognized." *See id.*

C. The decision below is not inconsistent with Congressional policy. The court of appeals evaluated the Commission-created "special circumstances" doctrine in light of legislation that had eased regulatory entry requirements and concluded that the "special circumstances" showing "has no place in the procompetitive licensing regulations of the revised Interstate Commerce Act." *Id.* at 1376. The "strong general policy against railroad invasion of the motor carrier field" that this Court recognized in *American Trucking Ass'ns, Inc. v. U.S.*, 364 U.S. 1, 6 (1960), had lost its underpinnings as a result of new Congressional policies favoring competition.

The court below thus agreed with the Fifth Circuit that no good reason existed to continue a policy that had outlived its usefulness and that was concerned with protection of the fledgling motor carrier industry. *See Tri-State Motor Transit Co. v. ICC*, 739 F.2d at 1376; *see also American Trucking Ass'ns, Inc. v. ICC*, 722 F.2d at 1252-53. The Fifth Circuit had concluded that the policy had been created and transformed by the ICC in light of the economic conditions that prevailed in 1935; there existed no statutory requirement that rail-

roads demonstrate "special circumstances" in advance of obtaining an unrestricted motor common carrier certificate. Because the doctrine was agency-created and transformed, no "repeal by implication" was effected by the policy change. *See id.* at 1248-49.[5]

II. Petitioners Have Failed to Prove Their Contention that the Decision Below Has Any Substantial Economic Impact; Even If Such a Showing Were Made, However, Petitioners' Arguments Do Not Warrant Review by This Court.

Trucking/labor petitioners' attempt to relitigate in this Court the need for "protection" of the motor carrier industry from railroad "invasion" (*see* Pet. at 17-18) is unavailing and inappropriate. To accomplish their impermissible objective, they rely on extra-record materials that allegedly demonstrate that "[i]f the decision below is permitted to stand, the way for rail domination of land transportation will have been cleared." *See* Trucking/labor Pet. at 17-18; *see also* Table I at 28a, Table II at 29a.

These gloomy predictions of economic harm have been considered and rejected by the ICC and two courts of appeals and do not warrant review by this Court. The decision below, which involved review of an individual licensing application, confers no power on the railroads in general or Rio Grande in particular to "dominate" the motor carrier industry. The Commission found, and the Eighth Circuit agreed, that a grant of unrestricted motor common carrier authority to Rio Grande, a relatively small railroad operating entirely within a four-

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[5] The conclusion that the policy was not required by opinions of this Court or statute was buttressed by the fact that the old policy in favor of "auxiliary" to or "incidental" to rail restrictions on rail-affiliated trucking companies never had been "iron-clad" and the Commission had liberally granted exceptions therefrom in appropriate circumstances. *American Trucking Ass'ns, Inc. v. ICC*, 722 F.2d at 1250.

state area, would be in the public interest. Petitioners have never challenged the extensive evidence supporting Rio Grande's application, choosing instead to attack the policy change in *Ex Parte MC-156* which was prompted by changes in the statute and which was affirmed by the Fifth Circuit. Their attempts to transform this application proceeding into a matter of industry-wide significance should be denied.

CONCLUSION

The petition for a writ of certiorari in No. 84-1518 should be denied.

Respectfully submitted.

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